

ORISSA HIGH COURT, CUTTACK.

O.J.C. Nos. 10642 and 14473, of 1998

In the matter of applications under Articles 226 and 227 of the Constitution of India.

In O.J.C. No. 10642 of 1998

Rabindra Kumar Nath and another ... Petitioners

Versus

State Bank of India and another ... Opposite Parties

AND

In O.J.C. No. 14473 of 1998

Mahendra Hazra ... **Petitioner**

Versus

State Bank of India and another ... **Opposite Parties**

For petitioners : M/s A.K. Mishra, B.B. Acharya,
J. Sengupta, D.K. Panda, P.R.J. Dash,
C. Mohanty, G. Sinha., Ramesh Ch.

Rout

and P. Sen.
(In both the O.J.Cs.)

For opposite parties : Mr. P.V. Balkrishna Rao.

PRESENT:

THE HONOURABLE MR. JUSTICE L. MOHAPATRA

AND

THE HONOURABLE MR. JUSTICE C.R. DASH

Date of Judgment : 19.07.2011

C.R. Dash, J. As both the O.J.Cs. relate to the same subject matter, they are taken up together for disposal by this common order.

2. In both the O.J.Cs. though the prayer is for quashing the result as published on 31.07.1998 with regard to the general candidates for the examination conducted on 21.06.1998 for Junior Management Grade Scale – I ('JMGS-I' for short), in essence Circular issued by the State Bank of India ('SBI' for short) with regard to promotion to JMGS-I, vide Annexures 2 and 3 are under challenge.

3. Rabindra Kumar Nath, petitioner no.1 and Akrura Barik petitioner no.2 in O.J.C. No.10642 of 1998 and Mahendra Hazra, petitioner in O.J.C. No. 14473 of 1998 joined as Assistants in the SBI at different times. The petitioners had expectation of promotion to the JMGS-I on acquiring the prescribed qualification for such promotion. Circular No. 46/92, Annexure-1 ('1992 Circular' for short) was in vogue so far as the promotion for the Assistants to JMGS-I is concerned. The said Circular provides for promotion under normal channel and appointment of trainee officers channel.

4. As asserted in the writ petitions, in 1992 Circular (Annexure-1) it is provided that for promotion under normal channel (under which channel the petitioners are to be promoted) the number of employees to be called for test would henceforth be five times the number of vacancy and once an employee is called for the written test, he / she would continue to be called in the subsequent years also till he / she exhausts all the chances available to him / her even if the

latter exercise would lead to calling of employees in excess of 1 : 5 ratio. Further it is provided that number of chances that would be available to an employee would stand increased to 5 and all such chances would have to be availed up on consecutive occasions with no gap between availing of the penultimate and 5th and final chance.

The aforesaid guidelines in 1992 Circular (Annexure-1) was modified on 07.01.1993 vide Staff Circular No. 5/93, Annexure-2 ('1993 Circular' for short) providing therein that the clerical and cash department staff, who have not crossed 50 years of age and have completed 21 years of service as on 01.08.1992, are eligible to appear in the test. The ratio of candidates to be called in relation to the vacancy at 1 : 5 was also amended.

On 24.02.1998, Staff Circular No. 87/97-98, Annexure-3 ('1998 Circular' for short) was issued. In the aforesaid Circular vide Annexure-3, the criteria for promotion under both the channels, i.e. normal channel and trainee officers' channel was modified. While the ratio of vacancy in relation to the candidates to be called for test was kept at 1: 5, all the employees, who had completed 15 years of service and who had not exceeded 50 years of age as on 01.08.1997, were allowed to be called for the test.

5. The petitioners, who were otherwise eligible, were called to sit in the examination held on 21.06.1998. The result of the examination was published on 31.07.1998. As the petitioners were not called for interview in spite of their appearance in the written test and good performance therein, they have moved this Court for quashing of the result published on 31.07.1998 vide Annexure-6 in O.J.C. No.

10642 of 1998 and vide Annexure-5 in O.J.C. No. 14473 of 1998. The grounds for the aforesaid reliefs, inter alia, are -

- (a) Inconsistency in the promotion policy of the SBI disentitling the petitioners to appear in the examination from 1994 to 1998; and non-maintenance of uniformity in the promotion policy and frequent changes therein to suit the favoured few;
- (b) Lack of secrecy in the conduct of examination and possibility of extending benefits to favoured few there in that examination.

6. The SBI (opposite parties) have filed Counter affidavit denying the claim of the petitioners. They took the plea that the current promotion exercise, which is the subject matter of the present O.J.Cs., is based upon the 1998 Circular vide Annexure-3 and as such the 1992 Circular vide Annexure-1 has no relevance so far as the promotion in question is concerned. It is further asserted that the 1998 Circular, vide Annexure-3 envisages clearly that the employees, who have completed 15 years of service, have to face a written examination and only the successful candidates in order of merit in the written test are to be called for the interview in the ratio of 1 : 5 depending upon the number of vacancies. In obedience of the aforesaid Circular vide Annexure-3, the persons, who became successful in the written test were called for the interview in the ratio of 1 : 5 and the petitioners having not become successful, they were not called for interview. The allegation of manipulation, maladministration in the examination and inconsistency in the

promotion policy were denied in the counter affidavit. It was specifically asserted that the petitioners having appeared in the written examination held as per the 1998 Circular, vide Annexure-3, they cannot now challenge the same after becoming unsuccessful in the examination.

7. In O.J.C. no.10642 of 1998, the petitioners have filed rejoinder affidavit re-asserting their claims and denying the assertions made there in the counter affidavit filed by the State Bank of India.

8. Mr. Aswini Kumar Mishra, learned Senior Counsel appearing for the petitioners in both the writ petitions, mainly bases his argument on the relevant Circulars to persuade us to accept that the Promotion Policy adopted vide 1998 Circular is defective and the petitioners have been deprived of their legitimate due for inconsistency in the promotion policy. Learned counsel appearing for the opposite parties on the other hand strenuously submits that the petitioners having appeared in the examination held in accordance with the 1998 Circular, vide Annexure-3, cannot now challenge the Circular itself and it is further submitted that after coming into force of the 1998 Circular vide Annexure-3 in the year 1998, the 1992 Circular vide Annexure-1 has no relevance. Learned counsel for the opposite parties tries to impress upon us as to how, there has been improvement in the promotion policy through these years for benefits of the maximum numbers of staff.

Before addressing the contentions raised by learned counsels for the parties we propose to find out as to what the relevant circulars referred to supra provide.

9. In 1992 Circular (Annexure-1) the relevant provisions relating to promotion under normal channel in respect of general candidates is as follows:-

(I) Number of employees to be called for written test :-

The number of employees to be called would henceforth be five times the number of vacancies with a proviso that once an employee is called for the written test, he / she would continue to be called in the subsequent years also till he / she exhausts all chances available to him / her, even if the latter exercise would lead to calling of employees in excess of 1 : 5 ratio.

(II) Number of chances available :-

The number of chances that would be available to an employee would stand increased to 5. All such chances would have to be availed of on consecutive occasions, with no gap between the availment of the penultimate and fifth and final chance.

It is pertinent to mention here that in 1992 Circular vide Annexure-1, there is no provision prescribing requisite qualification

for general category employees to appear in the test / examination, and it is further found from Annexure-1 that the afore-quoted provisions have been inserted in 1992 Circular (Annexure-1) by way of revision / amendment of the existing Circular. The existing Circular, when the 1992 Circular vide Annexure-1 came into effect, was Circular No.116 of 1982 (Annexure-B to the Counter Affidavit filed in W.P. (C) No. 14473 of 1998). The prescribed qualification that was there in Circular No. 116 of 1982 did not undergo any change or revision in the 1992 Circular vide Annexure-1. The qualification for the general category employees to appear in the test / examination for promotion through normal channel, therefore, is as follows (as provided in Circular No. 116 of 1982) :-

The employee recommended from the General Category should have completed no less than six years confirmed service as on 30.11.1982 and they are not over 50 years of age as on 30.11.1982.

The 1992 Circular was modified by the 1993 Circular (Annexure-2) and the modified provisions are as follows :-

- (I). Category :- Clerical and the cash department staff (except cashiers promoted from sub-ordinate cadre).
- (II) Age :- Not exceeding 50 year as on 01.08.1992.
- (III) Service :- Twenty one years of service as on 01.08.1992 for general candidates.....

The stipulation of 21 years of service in Annexure-2 failed to satisfy the prescribed norm of calling employees / candidates five times of the number of vacancies. It is found from Annexure-C to the counter affidavit in O.J.C. No.14473 of 1998 (Staff Circular No.18 of 1993) that the requirement of prescribed service was reduced to 13 years vide Annexure-C perhaps with a view to get more employees / candidates to satisfy the ratio of 1 : 5 in relation to the vacancies. After due deliberation with the members of staff federation and other bodies 1998 Circular vide Annexure-3 was formulated. The objective of the Policy vide the aforesaid Circular has been outlined in paragraphs 2, 3, 4 and 5 of the Circular, which are quoted below :-

“2. The Circular for promotion under the normal channel provides, inter alia, for calling candidates for the written test in the ratio 5 for 1 vacancy. *In view of the limited number of vacancies and the stipulated number of chances each candidate could take, the same set of candidates are being permitted to appear for the test, year after year.* In most circles, the service range for becoming eligible to take the test continues to be 17/18 years, leading to dissatisfaction among employees, who aspire for promotion but continue to remain in the clerical cadre for want of requisite service seniority.

3. The issue has been engaging the Bank's attention for quite some time as many Local Head Offices have been asking Central Office to permit them to call more

employees to appear for the test to enlarge the basket of available candidates. A committee has been constituted to look into the entire gamut of career path for workmen staff and it is expected to submit its report soon and the revised Circular that may be evolved on the basis of its recommendations may be introduced for the next year.

4. The Staff Federation has been requesting the Bank to work out an interim arrangement, *in the meantime for this year's (1997-98) Promotion exercise*, permitting all employees with a minimum service of 15 years to appear for the test for Promotion to Junior Management Grade, under the normal (seniority-cum-merit) channel.

5. Central Office have examined the matter and decided with the approval of the Executive Committee of the Central Board (in its meeting held on the 19th February 1998) to modify the Circular, *as a one time measure, for promotion from clerical cadre to Junior Management Grade for the current year, i.e., 1997-98, as under :*

i) *The present policy of limiting the number of candidates to 5 for 1 vacancy along with the provision for calling the repeaters until they exhaust all their chances consecutively (5 in case of General Candidates and 6 in case of SC/ST*

candidate) / become over-aged will be continued for the current year.

- ii) In the event of the present policy not resulting the service range for being eligible for promotion to 15 years, the bank will allow all the clerical cadre employees putting in 15 years of total service as on the 1st August, 1997 and otherwise eligible for promotion to appear for the test.
- iii) In order to ensure that the ratio of the number of candidates to vacancies is not less than 5 to 1 against reserved vacancies, service requirement will be lowered for SC/ST candidates to the required extent wherever necessary.
- iv) Such of those employees who become eligible for promotion in terms of Clause (ii) above (having put in 15 years of service as on 1.8.1997) for the current year, *shall not automatically be entitled to appear for the next year's test, unless they become so eligible under the proposed new promotion policy*".

(Emphasis supplied)

10. The aforesaid 1998 Circular, from the above provisions is clear that it provides for an interim arrangement till finalization of the regular promotion policy. It prescribes the following qualifications :-

- (I) Category :- Clerical and Cash department staff (except record keepers / cashiers promoted from sub-ordinate cadre).
- (II) Age :- Not exceeding 50 years of age as on 01.08.1997.
- (III) Service :- As a one-time measure, it has been decided with the approval of ECCB to modify the policy for the current year, i.e. 1997-98, as mentioned in paragraph-5 above.

11. From the aforesaid Circulars it is clear that only the requirement of service experience has undergone a change from six years of confirmed service to 21 years of service in 1993 Circular. The same has been reduced to 13 years again in Circular No.18 of 1993 and the same was decided to be kept at 15 years in the 1998 Circular. Other conditions as to the ratio of vacancy in the post in relation to the candidates / employees to be called for test has been kept unaltered at 1 : 5 throughout; the scheme of examination has been kept unaltered; the maximum age limit has been kept unaltered and, above all, the rights of the repeater candidates (a candidate who has already appeared in the examination but has become unsuccessful) until they exhaust all their chances consecutively has also been kept unaltered in the impugned Circular (1998 Circular). It is further clear from the 1998 Circular that it is an ad hoc Circular devising an interim arrangement for the promotion exercise relating to the year 1997-98 only. It has taken care of the fact that all employees completing 15 years of service, who shall appear in the test, shall not be

automatically entitled to appear in the next year's test unless they become so eligible under the proposed new Promotion Policy. In other words, the employees, who appear in the test by virtue of their service experience of 15 years, shall not automatically be entitled to the rights of a repeater candidate, unless such a right is given to them in the proposed new promotion policy. Such a provision in 1998 Circular makes it clear that it does not affect the rights of the repeater candidates, who have already faced the test and have acquired right to take all the five consecutive tests (subject however to modification/amendment in the proposed new promotion policy). Another aspect is clear from the aforesaid Circulars that except the service experience which has undergone a change, other provisions relating to scheme of the test, age qualification, number of chances (to the extent limited by 1998 Circular in respect of candidates with 15 years of service experience), etc., as contained in the 1992 Circular vide Annexure-1, remained operative. In other words, the 1993 Circular or 1998 Circular has not at all been issued to replace the 1992 Circular, vide Annexure-1.

12. The first contention raised by Mr. Mishra, learned Senior Counsel appearing for the petitioners in both the writ applications is that the petitioners have suffered for change in the Promotion Policy and they have been deprived of their legitimate claims to get the promotions. Both the petitioners in O.J.C. No. 10642 of 1998 are asserted to have appeared in the test in 1993. They however failed to get through. According to 1992 Circular, they have had a right to appear in five consecutive tests, as they became unsuccessful in the

year 1993. The stipulation of 21 years of service experience in 1993 Circular, therefore, do not affect the petitioners in O.J.C. No. 10642 of 1998, they having already had the rights to appear in four more consecutive tests after they became unsuccessful in the 1993 Test by virtue of the 1992 Circular. Had the 1993 circular affected them, they would have been debarred from appearing in the 1993 test conducted by the Bank as the 1993 circular vide Annexure-3 has been made effective with effect from 01.08.1992. But, as fate would have it, no test was held from 1994 till the test in 1998 (under 1998 Circular) and the petitioners in O.J.C. No.10642 of 1998 could not avail themselves of the opportunities of appearing in four more consecutive tests as per their entitlement under 1992 Circular. They were allowed to face the test in 1998 and, the 1998 Circular, as it shows, had protected the rights of repeater candidates like the present petitioners. They were also otherwise eligible to appear in the 1998 test in view of their service experience. They again became unsuccessful in the 1998 test. None of the Circulars provides for any preference so far as repeater candidates are concerned. They are on equal footing with the freshers and they are to be promoted on the basis of marks secured in the test. The petitioners in O.J.C. No. 10642 of 1998, therefore, cannot be held to have been affected by change in the qualification relating to the service experience on two occasions in 1993 and in 1998. The only grievance they can make is that no test was held from 1994 to 1998 to afford them the opportunity to appear in the test for five consecutive chances. The stipulation in the 1992 Circular is “five consecutive chances” and not “five consecutive years”. There is no reference to ‘year’ anywhere else though there is reference to “consecutive

occasions". Such references have been made in the 1992 Circular keeping in mind perhaps the situation that every year posts may not be available for promotion and non-availability of posts depends on many factors including saturation in a cadre. The opposite parties in the counter affidavit have taken the plea that tests from 1994 to 1997 were not held for non-availability of sufficient number of posts in the circle. If the Promotion Policy would have been one providing for personal promotion, matter would have been different; but the Promotion Policy of the Bank speaks of substantive promotion which depends upon availability of posts. In view of the above, the petitioners in O.J.C. No. 10642 of 1998 cannot be said to have suffered for change in the Promotion Policy and they cannot be said to have been deprived of their legitimate claims.

13. So far as the petitioner in O.J.C. No. 14473 of 1998 is concerned, he has not been affected by 1993 Circular, as no test was held from 1994 to 1997 and by the time the ad hoc Circular in 1998 (Annexure-3) came into force, he had already acquired the requisite qualification to appear in the test and he also appeared in the test. In view of such fact, therefore, it cannot be said that the petitioner in O.J.C. No. 14473 of 1998 suffered for change in the Promotion Policy.

14. It is next contended that retrospective operation was given to the 1998 Circular, vide Annexure-3, though all promotion policy should be prospective in nature. Such a submission by Mr. Mishra, learned Senior Counsel appearing for the petitioners does not

commend to us in as much as 1998 Circular is only an ad hoc arrangement under the 1992 Circular to take care of the vacancies which were due to be filled up with effect from 01.08.1997. The test for the posts was held after formulation of the aforesaid policy vide Annexure-3 and that is why it was made effective from 01.08.1997 to take care of the entire promotion exercise to the posts due to be filled up with effect from 01.08.1997. In other words, 01.08.1997 was fixed as the cut-off date for initiation of the promotion exercise for the year 1997-98. In essence, therefore, it cannot be said that retrospective operation was given to the 1998 Circular vide Annexure-3, which is only an ad hoc policy to take care of promotions to the posts due to be filled up with effect from 1st August, 1997.

15. It is further contended by Mr. Mishra, learned Senior Counsel that the Policy is discriminatory, as the procedure adopted would create disharmony among the staff members. Such a contention also appears to be spacious. It is clear by now that 1998 Circular vide Annexure-3 is an ad hoc policy providing for an interim arrangement for promotion with effect from 01.08.1997. It had only revised the requisite qualification relating to service experience just to increase the basket so as to justify calling of five candidates for one vacancy in the ratio of 5 : 1. The Circular was not operative for the subsequent years. It protected the rights of the repeater candidates and disentitled the candidates, who appeared in the examination by virtue of the revised service experience, to appear in the subsequent tests, if they were not covered under the new proposed promotion policy. The test, which the candidates were asked to take, was

uniform for all and those who qualified the test were to be given promotion. The policy, therefore, cannot be said to be discriminatory, as it has only increased the basket by allowing some more candidates. Further, it is well settled that when allegation is made to the effect that a particular policy has been devised to favour an individual, a group of individuals or a class and there has been discrimination, it is to be shown positively as to who is/are that individual, group of individuals or class, who has / have derived benefit directly from the policy. The writ petitions are silent on these points and Mr. Mishra, learned Senior Counsel appearing for the petitioners has also not addressed these facts. In view of such fact, the 1998 Circular cannot be said to have sown germ of discrimination and disharmony among the staff, though it might be a presumptive apprehension in the minds of the petitioners.

16. Next it is contended on behalf of the petitioners that the 1998 Circular having given undue weightage on performance allowing at the same time much junior candidates (Candidates with 15 years service experience only) to sit with the petitioners in the examination, the principle of “seniority cum merit” was given a complete go bye.

Hon’ble Supreme Court in **K. Samantray v. National Insurance Co. Ltd.**, A.I.R. 2003 S.C. 4422, while discussing the promotion policy, held that –

“6. In all services, whether public or private there is invariably a hierarchy of posts compromising of higher posts and lower posts. Promotion, as understood under the Service Law

Jurisprudence, is advancement in rank, grade or both and no employee has right to be promoted, but has a right to be considered for promotion. The following observations in *Sant Ram Sharma v. State of Rajasthan and others* (AIR 1967 S.C.1910) are significant :

“The question of a proper promotion policy depends on various conflicting factors. It is obvious that the only method in which absolute objectivity can be ensured is for all promotions to be made entirely on grounds of seniority. That means that if a post falls vacant it is filled by the person who has served longest in the post immediately below. But the trouble with the seniority system is that it is so objective that it fails to take any account of personal merit. As a system it is fair to every official except the best ones: an official has nothing to win or lose provided he does not actually become so inefficient that disciplinary action has to be taken against him. But, though the system is fair to the officials concerned, it is a heavy burden on the public and a great strain on the efficient handling of public business. The problem, therefore, is how to ensure reasonable prospect of advancement to all officials and at the same time to protect the public interest in having posts filled by the most able man? In

other words, the question is how to find a correct balance between seniority and merit in a proper promotion-policy.”

7. The principles of seniority-cum-merit and merit-cum-seniority are conceptually different. For the former, greater emphasis is laid in seniority, though it is not the determinative factor, while in the latter merit is the determinative factor. In *The State of Mysore and another v. Syed Mahamood and others* (AIR 1968 SC 1113), it was observed that in the background of Rule 4(3)(b) of the Mysore State Civil Services (General Recruitment) Rules, 1957 which required promotion to be made by selection on the basis of seniority-cum-merit, that the rule required promotion to be made by selection on the basis of “seniority subject to fitness of the candidate to discharge the duties of the post from among persons eligible for promotion”. It was pointed out that where the promotion is based on seniority-cum-merit the officer cannot claim promotion as a matter of right by virtue of his seniority alone and if he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted. But these are not the only modes for deciding whether promotion is to be granted or not.”

17. In 1982 Circular, qualification as to service experience to appear in the test for promotion was 6 (six) years confirmed service. The same qualification did not undergo any revision in 1992 Circular vide Annexure-1. The ratio of vacancy in relation to the number of candidates to be called for the test has been kept at 1 : 5 throughout since 1992. The repeater candidates have been conferred with rights to be called for five consecutive tests. The combined effect of all the aforesaid provisions is that the numbers of candidates to be called for test were always limited with further corollary effect that maximum numbers of repeater candidates were to be called successively till they exhaust five chances with little room for freshers in the zone of consideration. The service experience of six years confirmed service, therefore, did not automatically bring employees with such qualification within the zone of consideration. The qualification as to service experience remained as paper qualification and no employee with less than 17/18 years of service experience (as asserted in the counter affidavit) could be brought under the zone of consideration. The 1998 Circular vide Annexure-3 brought all the employees with 15 years service experience within the zone of consideration. Such a move is an attempt to rationalize the promotion policy than to breed discrimination as alleged. Out of all the candidates who appeared in the written test 1.5 times of candidates of the number of vacancies were called for the interview. As found from the merit list, 149 candidates (i.e., 99 posts x 1.5) in order of merit were called for interview, whereas serial nos. of Mahendra Hazra (petitioner in O.J.C. No. 14473 of 1998) and Akrura Barik and Rabindra Kumar Nath (petitioner in O.J.C. No. 10642 of 1998) are 179, 184 and 187

respectively. They having fallen beyond the number of candidates called for interview in relation to the vacancies, in the merit list, they were not called for interview. The test devised, which is being followed to give promotion to J.M.G.S.-1, is one to test the minimum merit a candidate should have for being promoted. The seniority was not at all ignored. All the candidates within the zone of consideration appeared in the same test and the best among them were picked up. Viewed in the background of the ruling of Hon'ble Supreme Court in the case of **K. Samantaray** (supra), it cannot be said that the principle of "Seniority-cum-Merit" was given a go bye and the petitioners should have been picked up on the basis of their seniority irrespective of their position in the merit list prepared.

18. Coming to the question of acquiescence raised by learned counsel appearing for the Bank, it is the settled law that when a candidate appears in the examination without protest and is subsequently found to be not successful in the examination, question of entertaining a grievance at his behest challenging the procedures adopted for the said examination would not arise. In this regard we are supported in our view by the ruling of Hon'ble Supreme Court in the case of **Om Prakash Shukla vs. Akhilesh Kumar Shukla**, AIR 1986 S.C. 1043 and **Madan Lal and other vs. State of Jammu and Kashmir and others**, AIR 1995 S.C. 1088. Further, it is found from the averments in the writ petition that none of the above writ petitions disclose any legal injury to the petitioners for inconsistencies in the promotion policy, as alleged. Even if all the contentions of the writ petitions are accepted, we fail to find a reason to come to a conclusion

that the petitioners would have been selected in the test held vide Annexure-3.

19. In view of the above, we do not find any merit in the writ petitions and both the writ petitions are accordingly dismissed.

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L. Mohapatra, J. I agree.

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Orissa High Court, Cuttack.
The 19th day of July, 2011. /*Parida.*